RENDERED: APRIL 9, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001310-MR

APEX CONTRACTING, INC. — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 01-CI-00198

CITY OF PARIS, KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE. Apex Contracting, Inc. ("Apex") appeals from an opinion and order of the Bourbon Circuit Court, entered May 31, 2002, which granted summary judgment in favor of the City of Paris, Kentucky ("the City"). We affirm.

On August 24, 1998, Apex entered into a contract with the City whereby Apex agreed to perform work on seven city blocks of Main Street in Paris, Kentucky, in a construction project known as the Main Street Sidewalks Improvement Project.

According to the record, the City was responsible for demolishing and clearing existing pavement, curbs and lighting, installing new electrical systems, installing new water, gas and sewer lines, and providing new traffic signals. Apex was to install new concrete sidewalks, driveway paving, entrance aprons and steps, construct new brick paving, erect new light poles, and install the new traffic signals.

As required by this contract, Apex presented the City with a schedule setting forth the sequence and timing for the project. Under this construction schedule, the City agreed to begin its work on the first block of the project on September 8, 1998. Every two weeks thereafter, the City was to begin work on the next block. Apex was to begin work on the first block on September 21, 1998, which was immediately after the City completed its work on the first block. With this construction schedule, both Apex and the City recognized that some of the City's work would have to be completed before Apex could commence work. Both parties originally agreed that Apex would have 180 consecutive days to complete this project after Apex received notification from the City to start its work. On August 24, 1998, the City informed Apex that it may begin work on September 8, 1998. Thus, under the terms of the contract, April 9, 1999, became the completion date for the entire project.

Unfortunately, the City encountered numerous delays in demolishing and removing the sidewalks and in the installation of the underground utilities. The City's slow performance required Apex to correspondingly slow its work so as to not supercede the City's work. As a result, Apex completed its portion of the project in 557 calendar days.

In response to the extra time and resources Apex expended on this project, Apex submitted a claim to the City for additional compensation in the amount of $281,224.47. The City subsequently rejected this claim. Thereafter, on July 20, 2001, Apex filed its complaint against the City in Bourbon Circuit Court for breach of contract. In its complaint, Apex asserted that its "performance of its contract work was impacted, interrupted and hindered" by the City's delays, thereby increasing the amount of time Apex needed to complete its obligations under this contract. In response, the City filed a motion for summary judgment, arguing that the August 24, 1998, contract contained a "no damage for delay" clause which specifically precluded Apex from recovering damages caused by the City's delayed performance. On May 31, 2002, the circuit court granted the City's motion for summary judgment after concluding that the contract contained a valid "no damage for delay" clause and that the City's actions failed to invoke any

recognized exception to the enforceability of "no damage for delay" clauses. This appeal followed.

The standard for summary judgment in Kentucky has been definitely announced in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In Steelvest, our Supreme Court adhered to the principle that summary judgment should be cautiously applied and not used as a substitute for trial. Id., at 483. Summary judgment "should only be used 'to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in its favor and against the movant.'" Id., quoting Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255, 256 (1985). Nonetheless, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Steelvest, 807 S.W.2d at 482. Accordingly, our standard for reviewing a trial court's award of summary judgment is whether the trial court correctly found that no genuine issues of material fact existed and that the moving party was entitled to judgment as a matter of law. Moore v. Mack Trucks, Inc., Ky. App., 40 S.W.3d 888, 890 (2001).

On appeal, Apex presents three arguments for our review. First, Apex argues that the trial court erred in

granting summary judgment to the City because the contract's "no damage for delay" clause does not bar it from recovering damages arising from the City's delays. We disagree.

Apex and the City agree that Paragraph 1.12 of their contract is a provision commonly known as a "no damage for delay" clause. Paragraph 1.12 provides in pertinent part as follows:

> The Contractor shall make no claim for extra compensation due to delays of the project beyond its control. Such delays may include those caused by any act of neglect on the part of the OWNER or Engineer, or by any employee of either, or by any separate contractor employed by the OWNER, or by changes ordered in the work, or by labor disputes, fire, unusual delays in transportation, adverse weather conditions not reasonably anticipated, unavoidable casualties, or by delay authorized by the OWNER pending arbitration, or by and other cause which the Engineer determines may justify the delay.

"No-damage-for-delay clauses 'are commonly used in the construction industry and generally recognized as valid and enforceable.'" John E. Green Plumbing & Heating Co., Inc. v. Turner Construction Company, 742 F.2d 965, 966 (6th Cir. 1984) (quoting W.C. James, Inc. v. Phillips Petroleum Co., 485 F.2d 22, 25 (10th Cir. 1973)). "No damage for delay" clauses have been recognized as enforceable by Kentucky courts. See Humphreys v. J.B. Michael & Co., Ky., 341 S.W.2d 229 (1960), overruled on other grounds by Foley Construction Co. v. Ward,

Ky. 375 S.W.2d 392 (1963). It is a fundamental principle of Kentucky law that courts "cannot deny enforcement of an otherwise valid contract merely because its enforcement would result in inequities in a particular case." More v. Carnes, 309 Ky. 41, 214 S.W.2d 984, 992 (1948). Summary judgment is appropriate when a party's claim for damages is barred by a contractual provision. Codell Construction Co. v. Commonwealth, Ky. App., 566 S.W.2d 161, 164-65 (1977).

In this matter, Apex contends that the City breached this contract by failing to perform its work in accordance with the mutually agreed upon project schedule and by issuing a notice to proceed prior to completing its own work. Apex concedes that Paragraph 1.12 of this contract bars it from recovering "delay damages" from the City. However, the crux of Apex's argument is that all other damages are not barred by Paragraph 1.12. In essence, Apex is not arguing that its work was delayed. Instead, Apex believes that the slow performance of the City's work hindered and obstructed Apex from completing its work on schedule.

In support of its position, Apex relies heavily upon the Sixth Circuit's decision in John E. Green Plumbing. In John E. Green Plumbing, similar to the case before us, the contractor claimed that the "no damage for delay" clause was inapplicable because its claim was not for delay damages, but rather for

damages caused by hindrances or obstacles created by the construction manager. In evaluating this argument, the Sixth Circuit held that, in the context of a "no damage for delay" clause, the word "delay" means time lost when work cannot be performed because the necessary preliminary work had not been completed. John E. Green Plumbing, 742 F.2d at 966. Using this logic, delay damages that fall under the scope of "no damage for delay" clauses refer only to the cost of an idle workforce. Id. Under this framework, the Sixth Circuit found that a portion of the contractor's extra manpower costs were incurred as a result of the construction manager's failure to perform tasks that hindered the contractor's ability to successfully complete its work, such as properly coordinating work or providing temporary heat to the contractor's employees. Id., at 967.

We find Apex's reliance on John E. Green Plumbing to be misplaced. First, Apex's claim for compensation is actually based on its contention that it incurred expenses because of the City's failure to perform its work in a timely manner, not because the City created extra obstacles or hindrances to Apex's ability to timely complete its work. A close examination of the record reveals that all of the City's work was preliminary and necessary to Apex's completion of its obligations under the contract. Based upon the rationale of John E. Green Plumbing, Apex's claim for compensation is barred because a "delay" that

falls under the "no damage for delay" clause includes time that is lost because a contractor's work cannot be performed due to the necessary preliminary work not being timely performed by another party. Additionally, in this contract, Apex cannot point to any provision requiring the City to complete work that is not considered to be preliminary and necessary to Apex commencing and completing its work under the contract. Thus, there is no evidence, as required by John E. Green Plumbing, that Apex incurred "other" damages from events, obstacles or hindrances that were not the direct result of the City's failure to timely complete preliminary work.

Moreover, our review of the record reveals that, unlike the contractor in John E. Green Plumbing, Apex incurred its increased costs primarily because its workforce came to a standstill numerous times. In a document entitled "Labor Efficiency/Impact Costs" that was submitted in its May 3, 2001, revised claim to the City, Apex alleged that "[t]he erratic and untimely demolition by the Owner caused our forces to 'stop and stand' on several occasions and be unable to perform an efficient flow of work." Moreover, in its complaint, Apex alleged that the City's failure to complete its work in accordance with the project's schedule "substantially slowed or stopped Apex's performance of its work on the Project." As a result of these work stoppages, Apex incurred its claimed

additional overhead and equipment costs. As such, it appears to us that Apex's claim for damages is also directly the result of maintaining its own idle workforce on this project, a result that is specifically barred by John E. Green Plumbing and contrary to Apex's own argument.

Finally, we believe that Codell, 566 S.W.2d 161, is dispositive to this matter before us. In Codell, the contractor attempted to recover extra compensation from the Commonwealth for additional work caused by changed conditions. This Court, however, rejected this claim after finding that a provision of the contract notified all potential contractors to conduct a private investigation into potentially changing conditions that could affect the completion of the project. Codell, 566 S.W.2d at 164. In rejecting the contractor's claim, the Court opined:

> In the instant situation the contractor bid and entered into a bad bargain in the final analysis, but this Court has no basis to salvage the operation. Unanticipated difficulties in completing the contract do not give rise to subsequent awards when the parties are in an equal position as to knowledge and information surrounding the contract.

Id., at 165.

Likewise, Apex submitted its bid and freely entered into this contract with the City. From the terms of their agreement, Apex was fully aware that the City was responsible for performing work on the project before Apex was to continue

its own work. Apex, then, was placed on notice that any delays that could occur with the City's work could hinder its own performance under this contract. Paragraph 1.12 of the contract clearly states that Apex "shall make no claim for extra compensation due to delays of the project beyond its control." Since Apex entered into this agreement with full knowledge that the express terms of Paragraph 1.12 prohibited it from seeking extra compensation for any delays caused by the City, Codell precludes Apex from submitting a claim for damages. Hence, this "no damage for delay" clause is enforceable under Kentucky law.

Apex next asserts that, even if the "no damage for delay" clause is valid under Kentucky law, its claim for extra compensation from the City falls within one of the recognized exceptions to the enforceability of such clauses. We are compelled to reject this assertion.

Apex first argues that its claim is valid under the unreasonable duration exception to the enforceability of such clauses. In Humphreys, 341 S.W.2d at 235, Kentucky's highest court adopted the opinion of a New York court in Mack v. State, 202 N.Y.S. 344 (N.Y. Ct. Cl., 1923), which held that a "no damage for delay" clause, by its very nature, eliminates the necessity of deciding whether a delay is reasonable. Apex has identified no Kentucky precedent that conclusively accepts the unreasonable duration exception as a valid defense. As such, it

appears that Kentucky law has not embraced the unreasonable duration exception to the enforcement of no damage for delay clauses. Thus, we believe that Apex's claim under the unreasonable duration exception is not tenable.

Next, Apex contends that it is exempt from the "no damage for delay" clause because the City actively interfered with its work performance. The active interference exception arises from the concept that other parties owe an implied obligation to refrain from doing anything that would unreasonably interfere with a contractor's opportunity to proceed with its work in a manner provided by a contract. U.S. Steel Corp. v. Missouri Pacific Railroad Co., 668 F.2d 435, 438 (8th Cir. 1982), cert. denied, 459 U.S. 836, 103 S. Ct. 80, 74 L. Ed. 2d 77 (1982). Kentucky recognized the active interference exception in Humphreys, 342 S.W.2d 229.

In Humphreys, the Kentucky Department of Highways issued a notice to proceed to a contractor despite knowing that the work site would not be ready for the contractor's work within the specified time. Humphreys, 341 S.W.2d at 231. The contractor complied with the notice to proceed and mobilized to the project site. Id. After arriving at the project site, however, the contractor's crew became idle and its work was held in a state of abeyance. Id. Despite the "no damage for delay clause" in the construction contract, the contractor claimed

that it was entitled to recover because of the highway department's failure to provide site access and active interference. Id., at 232. The Court rejected the contractor's claim, holding that a contractor cannot allege active interference unless the owner has issued an order or directive requiring the contractor to keep its crew and equipment at the site in a state of readiness to proceed with its work. Id., at 234-35. Since the highway department issued no such order or directive, the Court found that the contractor's claim for extra compensation was barred by the contract's "no damage for delay" clause. Id., at 235. Thus, Humphreys stands for the principle that, in Kentucky, an owner's act of issuing a notice to proceed before it had completed the preliminary work is not an act of active interference sufficient to render the no damage for delay clause unenforceable. Id.

In this matter before us, Apex, similar to the contractor in Humphreys, was free to make its own decision concerning the use of its personnel and equipment. Apex's contention that, fearing the City's request for liquidated damages, it mobilized its personnel and equipment at the job site despite knowing that the City's work had not been completed is completely without merit. There is simply no evidence in the record supporting this contention. Moreover, the City never directed or otherwise ordered Apex to keep its personnel and

equipment at the job site in a state of readiness. Thus, it is clear to us that Apex's claim does not fall under the active interference exception to the enforceability of "no damage for delay" clauses.

Apex also asserts that its claim falls within the breach of fundamental obligation exception to the enforceability of a "no damage for delay" clause. Our review of the record, however, reveals that Apex failed to present this assertion to the trial court. "It is an elementary rule that trial courts should be given the opportunity to rule on questions before those issues are subject to appellate review." Swatzell v. Commonwealth, Ky., 962 S.W.2d 866, 868 (1998), overruled on other grounds by Rapier v. Philpot, Ky., _____ S.W.3d _____ (2004). Since this issue was not presented to the trial court or otherwise preserved for appellate review, we shall not consider it now.

Finally, Apex argues that the trial court's order granting summary judgment to the City was erroneous because Apex is entitled to recover damages from the City under the contract's suspension of work clause. We disagree.

Paragraph 1.65, the suspension of work clause, provides as follows:

> The OWNER shall have the authority to suspend Work in whole or in part by giving five (5) consecutive calendar days notice to

> the Contractor in writing. The written notice shall fix the date on which the Work shall be resumed, and the Contractor shall resume the Work on the date so fixed. The OWNER shall reimburse the Contractor for expenses incurred by him in connection with the Work under this Contract as a result of suspension if the suspension of the Work is caused through no fault of the Contractor himself.

Humphreys involved a similar contractual provision. In assessing that contractual provision, that Court held that "the right to suspend the work . . . was a discretionary prerogative which was exclusively reserved to the defendant for its sole benefit." Humphreys, 341 S.W.2d at 235. The suspension of work clause in the contract herein only contemplates work suspensions ordered at the discretion of the City. The record is clear that the City ordered no suspensions of work, nor directly asked Apex to demobilize. Accordingly, we believe the trial court correctly granted the City's motion for summary judgment because no genuine issue of material fact exists regarding this issue.

For the aforementioned reasons, the judgment of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

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